DE 03-186

FLORIDA POWER & LIGHT COMPANY

Petition for Declaratory Ruling

Order Regarding Applicability of RSA 362:4-c

O R D E R N O. 24,258

December 31, 2003

APPEARANCES: Joel D. Newton, Esq. and Orr & Reno, P.A. by Douglas L. Patch, Esq. for Florida Power & Light Company; Robert A. Bersak, Esq. for Public Service Company of New Hampshire; Devine Millimet & Branch, P.A. by Mark W. Dean, Esq. for New Hampshire Electric Cooperative, Inc.; Office of Consumer Advocate by F. Anne Ross, Esq. on behalf of residential ratepayers; and Donald M. Kreis, Esq. of the Staff of the New Hampshire Public Utilities Commission.

I. PROCEDURAL HISTORY

The question posed in this phase of the instant proceeding requires the New Hampshire Public Utilities Commission (Commission) to decide whether a foreign public utility, Florida Power & Light Company (FP&L), would become subject to regulation as a public utility under New Hampshire law by acquiring the transmission substation located at the Seabrook nuclear power plant. For the reasons that follow, the Commission concludes that FP&L is subject to such regulation under New Hampshire law.

FP&L instituted this case by filing a petition for declaratory order on September 23, 2003. The petition, and the issues it raises, arise out of a September 10, 2003 decision of

the Federal Energy Regulatory Commission (FERC), *FPL Energy Seabrook, LLC*, 104 FERC ¶ 61,258 (Sept. 10, 2003) (FERC Order). The FERC Order authorizes the transfer pursuant to 16 U.S.C. § 824B (Section 203 of the Federal Power Act) of the Seabrook transmission substation to FP&L from an affiliate, FPL Energy Seabrook, LLC. The Commission intervened in the federal administrative proceedings leading to the FERC Order, noting that it was unresolved whether such a transfer would subject FP&L to regulation as a public utility under New Hampshire law. The FERC Order referred to FP&L's commitment to resolving the state jurisdictional issue prior to completing the transaction. FERC Order at ¶ 24. This led to FP&L's request to the Commission for a declaratory order.

The Commission conducted a Pre-Hearing Conference on October 16, 2003 and thereafter issued Order No. 24,220 (October 23, 2003). Order No. 24,220 noted the appearance of the Office of Consumer Advocate (OCA) on behalf of residential ratepayers and the granting at the Pre-Hearing Conference of intervention petitions submitted by Public Service Company of New Hampshire (PSNH) and the New Hampshire Electric Cooperative (NHEC). Order No. 24,220 further adopted the parties' recommendation that the proceeding be bifurcated so that the Commission first ruled on the threshold issue of whether FP&L is subject to regulation as a public utility under New Hampshire law. The Commission agreed

with the parties that any other issues – i.e., the scope and extent of such state-law regulation – would only need to be resolved if the Commission found jurisdiction.

The Commission further adopted the parties' recommendation of an evidentiary hearing to develop an appropriate record for ruling on the jurisdictional issue. Accordingly, and pursuant to Order No. 24,220, FP&L and PSNH submitted pre-filed direct testimony on October 24, 2003, the Commission conducted an evidentiary hearing on October 29, 2003, PSNH and the NHEC submitted briefs on November 12, 2003, the OCA indicated that it joined the PSNH brief on November 13, 2003 and, on November 21, 2003, FP&L submitted a reply brief.

II. POSITIONS OF THE PARTIES AND STAFF

A. Florida Power & Light Company

As noted in the petition, FP&L contends that as the owner of the Seabrook substation it would be exempt from regulation as a New Hampshire public utility based on RSA 362:4-c. This statute, entitled "Electric Generation Companies, When Public Utilities," recites a specific exemption from the definition of "public utility" applicable to the Commission's enabling statutes and provides in relevant part that an entity does not become a New Hampshire public utility

> "solely by virtue of owning, operating, or managing any plant or equipment or any part of the same which has received a certificate of site and facility as an

> energy facility or as a bulk power supply facility pursuant to RSA 162-H after July 1, 1998, or are sold after July 1, 1998, for the generation of sale of electricity *or for transmission of electricity from such a plant to an interconnection with the transmission grid*.

RSA 362:4-c, I (emphasis added). FP&L's position is that Seabrook station is an energy or bulk power facility within the meaning of the statute, the substation exists for the transmission of electricity from Seabrook Station to an interconnection with the transmission grid and, thus, FP&L would be entitled to invoke the exception upon taking title to the substation.

FP&L concedes that the question is unresolved as a matter of New Hampshire law, but takes the position that established principles of statutory construction support its interpretation of RSA 362:4-c. To that end, FP&L cites New Hampshire Supreme Court authorities to the effect that the Commission (1) is obliged to give the words of the statute their plain and ordinary meaning, (2) is obliged to presume that the Legislature chose the words of the statute advisedly, (3) must interpret the statute in a manner consistent with the statute's purposes, (4) must interpret statutes so that the specific governs over the general and (5) must allow later enactments to prevail over earlier ones when there is a conflict between such enactments.

In particular, FP&L notes that the word "solely" appears in the statute in the clause referencing certain plant or equipment but not in the clause referring to transmission facilities. Thus, according to FP&L, the Commission should interpret RSA 362:4-c so as to apply the regulatory exemption to a transmission facility that interconnects a generation facility to the grid but also has other purposes. In its petition, FP&L conceded the existence of such an additional purpose, noting that the Seabrook substation is part of the pooled transmission facilities (PTF) of the New England Power Pool (NEPOOL).

With regard to the statute's purposes, FP&L notes that RSA 362:4-c was enacted in 1998 "during the height of legislative efforts to deregulate the electric industry in New Hampshire." Petition at 6. According to FP&L, the Legislature's overall purpose in enacting RSA 362:4-c was to ease regulation of generation facilities and the associated transmission infrastructure. In the view of FP&L, interpreting RSA 362:4-c so as to allow regulation of the owner of the Seabrook transmission substation would run counter to this overall purpose.

FP&L's positions with regard to the specific governing over the general and later enactments prevailing over earlier conflicting ones all relate to the general definition of "public utility" in RSA 362:2 and the fact that this definition

originated in 1911. According to FP&L, to the extent there is a conflict between RSA 362:2 and RSA 362:4-c, RSA 362:4-c should prevail because it is both more specific and more recent in time.

FP&L makes certain additional arguments in its reply brief. Specifically, FP&L contends that irrelevant to the RSA 362:4-c determination being made here is the distinction the FERC draws for cost allocation purposes between interconnection-only facilities and transmission facilities. According to FP&L, it still qualifies for the RSA 362:4-c exemption even though some parts of the Seabrook substation are treated as interconnection-only facilities by FERC.

FP&L further points out in reply that the substation represents a single asset that is entirely under the operational control of an independent system operator, ISO New England. Indeed, FP&L contends that the Seabrook substation presents the Commission with a set of unique and specific circumstances that bolster the case for RSA 362:4-c exemption. Specifically, FP&L points out that it is separate from FPL Energy Seabrook, which owns Seabrook Station, and that FP&L will upon acquiring the substation have no retail customers in New Hampshire, nor will it have the extensive transmission and distribution system in New Hampshire that other substation owners possess.

The FP&L reply brief draws the Commission's attention to its decision in *Luminescent Systems, Inc.*, Order No. 24,172 (May 13, 2003). In that case, the Commission waived an otherwise applicable rule and determined that it would not assert regulatory jurisdiction over ISO New England or the New England Power Pool (NEPOOL) even though one or more retail customers had registered as NEPOOL market participants for the purpose of buying retail power directly through NEPOOL (which generally facilitates the sale of power at the wholesale level to retail distributors). According to FP&L, the same policy considerations that led the Commission to stay its hand in that case justify a similar non-assertion of jurisdiction here. In that regard, FP&L notes that ISO New England is not regulated as a New Hampshire public utility even though the statutory definition of "public utility," RSA 362:2, specifically includes every company operating any transmission plant or equipment in New Hampshire.

FP&L characterizes the positions of PSNH, NHEC and OCA as a "simplistic and overly-constraining" interpretation of RSA 362:4-c. According to FP&L, these parties would limit the regulatory exception to single-purpose radial transmission

facilities when the Legislature intended no such gloss on the statute.[1]

According to FP&L, the testimony of its witness demonstrates that the Seabrook substation is essential for Seabrook Station to transmit electricity to the transmission grid. Thus, FP&L reasons, the substation is used both for interconnection and transmission. FP&L draws the Commission's attention to Exhibit 8, which represents the schematic diagram of the substation with all "looped" (as opposed to radial) facilities omitted. According to FP&L, this exhibit graphically illustrates that it would be impossible for Seabrook Station to move electricity to the transmission grid without the balance (i.e., the looped portion) of the substation. According to FP&L, the FERC's decision in *Sagebrush*, 103 FERC ¶ 61,332 (2003) supports its position – particularly paragraph 16 of that decision, which distinguishes the *Sagebrush* case from the circumstances of the Seabrook substation.

FP&L reprises its statutory construction arguments in reply to the assertions of the other parties. FP&L draws the Commission's attention to *Mountain Valley Mall Associates v. Municipality of Conway*, 144 N.H. 642 (2000). The Court in that case referred to an established statutory construction

[1] At hearing, there was extensive testimony about "looped" versus "radial" facilities, i.e., facilities over which power can flow in multiple directions (looped) as opposed to facilities in which power flows in only one direction (radial). *See, e.g.*, tr. at 55 and 74-75.

principle, known as the "last antecedent" rule, which provides that "a modifying clause is confined to the last antecedent unless there is something in the subject matter or dominant purpose which requires a different interpretation." *Id.* at 652 (citations omitted). It is FP&L's contention that when one applies the last antecedent rule to RSA 362:4-c the word "solely" cannot be deemed to modify the phrase "for transmission of electricity from such a plant to an interconnection with the transmission grid." According to FP&L, this is because the word "solely" modifies only the language that immediately follows it, which concerns RSA 162-H energy facilities and bulk power supply facilities.

Finally, FP&L contends in reply that there appears to be no legislative history addressing the matter in contention, and that policy considerations justify the result it requests. Specifically, FP&L notes that the substation is already regulated by the FERC, operates exclusively at the wholesale level and, thus, there is nothing for the Commission to regulate, other than the safety and reliability standards that would specifically still apply to FP&L under RSA 362:4-c after it acquires the substation.

B. Public Service Company of New Hampshire

PSNH contends that when it becomes the owner of the Seabrook substation FP&L will not qualify for the regulatory

exemption set forth in RSA 362:4-c. This is so, according to PSNH, because the business it will be conducting in New Hampshire will not be limited solely to the ownership, operation and management of plant or equipment necessary to interconnect Seabrook Station to the transmission grid. According to PSNH, FP&L itself has proven this point by representing to the FERC that the substation is an integral and vital part of the wholesale transmission system.

PSNH draws the Commission's attention to Exhibit 5, which is an October 2, 2003 letter from FP&L offering certain comments about a draft Transmission Operating Agreement in connection with plans to create a Regional Transmission Organization (RTO) out of what are presently NEPOOL and New England's independent system operator (ISO-NE). In particular, PSNH points to language at page three of that document referring to an FP&L objective of "seek[ing] cost recovery for its transmission facilities and transmission support payments." According to PSNH, this objective would be thwarted if the only facilities FP&L owned in New Hampshire were those used to interconnect Seabrook Station with the transmission grid. Thus, in the view of PSNH, the OCA was correct at hearing when it accused F&PL of "regulatory whipsaw." According to PSNH, FP&L has been telling the FERC and ISO-NE that it will own plant that is vital to the regional transmission grid, at the same time it

has been making representations here that all it will own in New Hampshire are generator leads between Seabrook Station and the transmission grid.

PSNH rejects FP&L's contention that it is entitled to an RSA 362:4-c exemption because the facilities in question have a dual use, i.e., interconnection of Seabrook and transmission. According to PSNH, (1) the statute does not provide an exemption for facilities used for such dual purposes, and (2) the record does not support a determination that the facilities are truly dual use. According to PSNH, the plain meaning of RSA 362:4-c – particularly in light of the word "solely" in the provision – establishes that the regulatory exemption would apply only if FP&L's substation had no other purpose than interconnecting Seabrook Station with the transmission grid.

PSNH notes that the current FP&L plan for the Seabrook substation follows an earlier and unsuccessful proposal to create an exempt wholesale generator – FPL Energy New England Transmission, LLC – to own and operate the substation. *See FPL Energy New England LLC*, 103 FERC ¶ 61,194 (2003) (rejecting this proposal). According to PSNH, the previous proposal would have involved transferring less substation facilities than FP&L

presently contemplates acquiring from FPLE Seabrook.[2]

PSNH rejects FP&L's proffered explanation for this change, theorizing that two alternative and more credible explanations exist: (1) adding the GSU to the transferred facilities bolsters FP&L's argument that it is acquiring interconnection facilities entitled to an RSA 362:4-c exemption, and (2) adding the GSU to the transaction would result in a capital investment by FP&L that exceeds the $30 million threshold that would entitle FP&L as a transmission owner to receive revenue under the NEPOOL Open Access Transmission Tariff (OATT).

Generally, PSNH contends that the sole reason for FP&L's acquisition of the Seabrook substation is to facilitate recovery in wholesale rates for these transmission facilities and related transmission support payments. In the hands of FPLE Seabrook, a merchant generator, the only opportunities for such recovery arise via the compensation FPLE Seabrook receives for the power and related products it sells. According to PSNH, FP&L is attempting to have the Commission treat it like a merchant generator for regulatory purposes while allowing it to

[2] Specifically, according to PSNH, FP&L proposes to acquire all substation facilities beginning at the "low side" of the generator step-up transformer (GSU) at the substation, whereas *FPL Energy New England Transmission, LLC* would have only acquired facilities on the "high side" of the GSU. In other words, under the previous plan the GSU would have remained the property of FPLE Seabrook.

become a transmission owner and provider for purposes of the OATT and wholesale rate recovery generally.

C. New Hampshire Electric Cooperative

The NHEC contends that FP&L would not be entitled to the RSA 362:4-c exemption as the owner of the Seabrook substation. According to the NHEC, a straightforward reading of the statute compels this conclusion. In the view of the NHEC, the evidence adduced at hearing would not support a determination that the Seabrook substation facilities are used solely for the purpose of interconnection Seabrook Station to the grid. By contrast, according to the NHEC, FP&L would be entitled to the RSA 362:4-c exemption if it were acquiring only those facilities at the substation that its witness identified as radially connecting the generating station to the grid.[3]

The NHEC rejects FP&L's "dual purpose" argument. According to the NHEC, the non-radial elements of the substation[4] serve only one purpose – to be an integral part of the New England transmission grid – and the owner of facilities with that purpose is not entitled to the RSA 362:4-c exemption. Finally, the NHEC contends that if the Commission were to accept FP&L's position here then FP&L could be exempt from Commission

[3] Specifically, the NHEC refers to Exhibit 2, which is a schematic diagram of the substation provided by FP&L. Certain parts of that diagram appear in red. It is those parts to which NHEC refers.

[4] Specifically, this refers to the parts of Exhibit 2 that appear in black.

jurisdiction if it owned the entire transmission grid in New Hampshire, on the theory that all such facilities exist, at least in part, to facilitate the interconnection of Seabrook Station with the grid.

D. Office of Consumer Advocate

As noted, *supra*, the OCA has indicated that it adopts the positions stated by PSNH in its brief.

E. Staff

Staff took no position as to the outcome of the proceeding at this stage, but urged the Commission to keep the relevant public policy objectives in mind as it seeks to discern the meaning of RSA 362:4-c and rule on its applicability here.

III. COMMISSION ANALYSIS

A. Factual Findings

We begin with the facts adduced at hearing, about which there was little controversy. The record reflects that the substation at issue in this proceeding is physically located within the perimeter of Seabrook Station but does more than merely interconnect Seabrook Station with the regional transmission grid. Rather, there are facilities at the substation that also interconnect via 345 kilovolt lines three other major substations – those at Tewksbury, Scobie Pond and Newington. As such, the substation is an integral part of the regional transmission system that operates when Seabrook Station

is not generating electricity and would need to continue to operate if Seabrook Station were to close.

Within the substation, there are two distinct kinds of facilities. There are radial facilities, which have two purposes: providing a pathway for electricity to move from Seabrook Station to the transmission grid and allowing Seabrook Station to receive station service, i.e., electricity for consumption by the facility when necessary. As already noted, these facilities are indicated in red on Exhibit 2. The ends of the radial facilities are marked on this exhibit as points A and B. There are also looped facilities, which is the equipment that allows power to be moved in various configurations to and/or from the Tewsksbury, Scobie Pond and Newington substations. These are the facilities that would remain in use even if Seabrook Station were to close permanently and neither generate power nor require station service.

We do not automatically equate "looped" with transmission and "radial" with interconnection. Rather, in this instance, it is our factual determination that the looped facilities at the Seabrook substation are transmission facilities. We also find that the radial components of the substation are not – but, rather, are for the transmission of electricity *from* the Seabrook generator to an interconnection with the transmission grid.

B. Statutory Construction and Legal Conclusions

We next turn to the parties' conflicting views on the meaning of RSA 362:4-c. It is our determination that RSA 362:4-c exempts from state-law utility regulation an entity owning facilities whose purpose is to transmit electricity from a merchant generator to an interconnection with the transmission grid. It does not, however, provide an exemption for an entity owning facilities that do more than interconnect a generator to that grid. In our view, the plain meaning of RSA 362:4-c requires such a determination.

The transmission facilities at the substation – i.e., the looped facilities that run to the left of points A and B on Exhibit 2 and appear therein in black rather than red – do not exist for the transmission of electricity from Seabrook station to an interconnection with the transmission grid. That is the purpose of the radial facilities to the right of points A and B, marked on Exhibit 2 in red. The looped facilities fall squarely within the definition of "public utility" found in RSA 362:2, which includes "any plant or equipment or any part of the same for the . . . transmission or sale of electricity ultimately sold to the public."

Such an interpretation does not transgress any canon of statutory construction cited by FP&L. Our analysis is based

on the plain and ordinary meaning of the words in question, which we presume that the Legislature chose advisedly.

As suggested by the NHEC, adopting the gloss offered by FP&L would lead to the potentially absurd conclusion that any part of the New Hampshire transmission grid would be exempt from regulation because it served in part to interconnect Seabrook Station with some part of the transmission grid. We must assume that the Legislature had no such intention. The plain meaning of RSA 362:4-c yields a conclusion that the overall purpose of the statute, which we are required to further, is to exempt from utility regulation merchant generators and the facilities that take energy from such facilities to the transmission grid. New Hampshire transmission facilities themselves continue to be covered by RSA 362:2.[5]

In enacting RSA 362:4-c,notably entitled "*Electric Generation Facilities*, When Public Utilities" (emphasis added), the Legislature undertook to exempt from utility regulation merchant generators and the lines that tie them to the transmission grid – but went no further. However, even if RSA 362:4-c were deemed to be ambiguous with regard to the situation in question and, thus, we found it necessary to have recourse to the legislative history of the enactment, *see Kaplan v. Booth*

[5] We perceive no conflict between specific and general provisions, nor between recent enactments and earlier ones. We therefore need not address the principles cited by FP&L for resolving such conflicts.

Creek Ski Group, Inc., 147 N.H. 412, 414-15 (2001), we would reach precisely the same conclusion.

RSA 362:4-c was enacted as Section 2 of 1998 N.H. Laws 191, approved by the Legislature as Senate Bill 341. Most of Senate Bill 341 was taken up with amendments to RSA 374-F concerning Transition Service. Indeed, section 1 of the measure, its Statement of Intent, makes no reference to exemptions from the definition of "public utility" but, rather, describes unanticipated court-ordered delays in the implementation of industry restructuring, which "have heightened the need to consider negotiated settlements to expedite restructuring, near term rate relief for customers, and customer choice." 1998 N.H. Laws 191:1. This, obviously, is a reference to the then-pending litigation between the Commission and PSNH, ultimately resolved by the Agreement to Settle PSNH Restructuring approved in 2000 in Docket No. DE 99-099. The question of PSNH's status as a public utility, regardless of any divestiture of generation or transmission assets, was not one of the matters in dispute in connection with the litigation.

Therefore, to gain insight into what the Legislature intended by RSA 362:4-c, it is useful to look beyond the bill itself. On April 28, 1998, the House Science, Technology and Energy Committee forwarded a report that unanimously recommended passage of Senate Bill 341 and included a written statement of

intent from Rep. Bradley, the committee chairman. Rep. Bradley's statement provides, in part, that the measure

> would *exempt any new electricity generation facility from being a public utility*. This amendment is intended to create a favorable regulatory climate for New Hampshire as many new gas generating plants are being proposed in New England and not all will be built. The amendment *also allows existing generation units to be exempt from public utility status once divestiture of assets occurs*.

April 28, 1998 Report of House Science, Technology and Energy Committee regarding S.B. 341 (emphasis added). In other words, the Legislature's focus was on allowing merchant generation facilities, most particularly new gas-fired units, to avoid certain regulatory oversight and not on exempting transmission owners from regulatory oversight.

C. Other Statutory Issues

We agree with FP&L that the Seabrook substation presents unique circumstances, but the statute clearly does not allow these circumstances to become outcome-determinative. We agree that the line the Legislature drew does not necessarily coincide with certain distinctions made by the FERC for its regulatory purposes. But in the absence of any preemption arguments, federal law is irrelevant in construing a state statute. And our decision in *Luminescent*, which concerned a waiver of one of our rules, provides no basis for varying our understanding of a clearly expressed statutory mandate. It is a

mandate that confers jurisdiction upon this agency, a matter we do not regard as discretionary. *See* RSA 362:2 (providing that the term "public utility *shall* include *every* corporation, company, association, joint stock association," etc., that provides, *inter alia*, transmission of electricity ultimately sold to public) (emphasis added); *see also Appeal of Omni Communications, Inc.*, 122 N.H. 860, 862-63 (1982) (discussing limits on Commission jurisdiction while noting that it has "role and *duty*" to regulate entities meeting definition of public utility) (emphasis added).

Finally, as to whether jurisdiction obtains, we are unable to reach a different conclusion based on FP&L's contention that we have "nothing to regulate" with respect to the substation. The threshold issue of whether the Commission has jurisdiction is one of statutory interpretation and there is no provision in this instance for waiving or foregoing jurisdiction once it has been established. The extent of jurisdiction exercised by the Commission, however, is an issue subject to a considerable range of discretion. The parties agreed that such issues relating to the scope of any Commission regulation of the substation and its owner would be deferred, if necessary, to a second phase of the proceeding – an approach we adopted. *See* Order No. 24,220, slip op. at 9-10. All we decide today is that by virtue of consummating the transaction

described in the FERC Order of September 10, 2003, FP&L would become a public utility within the meaning of New Hampshire law. The extent of regulation to which FP&L would be subject as a New Hampshire public utility – or, indeed, whether FP&L should receive authorization from us to become a New Hampshire public utility, *see* RSA 374:22 (requiring such approval) – are questions we will take up in the next phase of the docket.

IV. CONCLUSION

In light of this determination, and pursuant to the parties' previous agreement, further proceedings are necessary. We will advise the parties by letter as to the date and time at which we will convene a status conference for the purpose of considering how and when to proceed.

Based upon the forgoing, it is hereby

ORDERED, that the request of Florida Power & Light Company for a declaratory order that it enjoys an exemption from Commission jurisdiction pursuant to RSA 364:4-c is DENIED; and it is

FURTHER ORDERED, that all additional issues raised by the Florida Power & Light Petition be deferred pending further scheduling order of the Commission.

By order of the Public Utilities Commission of New Hampshire this thirty-first day of December, 2003.

Thomas B. Getz	Susan S. Geiger	Graham J. Morrison
Chairman	Commissioner	Commissioner

Attested by:

Michelle A. Caraway
Assistant Executive Director